No. 84-571

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

HARRY N. WALTERS, Administrator of The Veterans Administration, et al.,

Appellants,

vs.

THE NATIONAL ASSOCIATION OF RADIATION SURVIVORS, a California non-profit corporation, et al.,

Appellees,

and AMERICAN G.I. FORUM, a national non-profit corporation,

Intervenor-Appellee.

Direct Appeal From The
United States District Court For
The Northern District Of California

BRIEF OF INTERVENOR-APPELLEE AMERICAN G.I. FORUM

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APPELLEE AMERICAN G.I. FORUM

The American G.I. Forum is the nation's largest Hispanic veteran's organization. It has 424 chapters in 37 states, including every major state, and approximately 50,000 members.

The American G.I. Forum was founded

in 1946 in Corpus Christi, Texas as a result of discriminatory practices by the government and veterans' groups towards Hispanics; the specific incident precipitating its formation was the denial of equal burial rights to an Hispanic World War II veteran.

The American G.I. Forum's local and national activities on behalf of veterans depend entirely on volunteer staff. Even its national and statewide officers are uncompensated.

The American G.I. Forum offers no formal representation of veterans before the Veteran's Administration and believes that effective representation before the Veteran's Administration requires, at least in complex cases, fully compensated counsel.

Although the American G.I. Forum has no quarrel with veterans' organizations that provide service representation be-

fore the Veteran's Administration, it does not believe that its members or other veterans are adequately or effectively served in the absence of an opportunity to freely choose between uncompensated service representatives and compensated attorneys.

SUMMARY OF ARGUMENT

Appellee American G.I. Forum fully adopts the Statement Of The Case and the legal arguments presented by the primary appellees NARS, et al.

For the convenience of the court, and to avoid duplication, the American G.I. Forum presents its argument in highlight form. It contends that the free market, and its corollary, consumer free choice, rather than paternalism, is the key to protecting the due process and First Amendment rights of veterans before the V.A.

In summary, The American G.I. Forum contends that: a) the ten dollar attorneys fee limit in effect constitutes a total prohibition against effective counsel and an unwarranted and wholly unnecessary interference with the free market and consumer choice; b) the record demonstrates that veterans' service representatives, albeit dedicated, are inadequate and the V.A.'s system, manned by over 800 attorneys, is far more adversarial than non-adversarial; c) the V.A. procedures are more complex and arcane than most criminal and civil procedures in which attorneys are either guaranteed or permitted without restriction; d) if uncompensated service representatives are as skilled as the government contends, informed market choices will prevent compensated attorneys from representing veterans, thereby avoiding the dangers Congress was allegedly concerned about;

and e) except for veterans, no other class of Americans is systematically precluded from securing counsel.

ARGUMENT

A. Once Permitting Counsel, Congress Cannot Prohibit Effective Counsel.

Ten dollars, the maximum attorneys fee permitted by statute, 38 U.S.C. §3404(c), has such trivial purchasing power (estimated six minutes of attorney time)[1] that it is, in effect, a prohibition against representation by competent or effective counsel.[2]

Although it might be argued that Congress could make findings of fact that counsel is unnecessary, by definition the

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1 Based on an average hourly fee of $100 per hour.

2 Assuming a complex case takes 500 hours, ten dollars amounts to two cents per hour.

allowance of a fee, however trivial, is an implicit finding that counsel may be necessary. However, Congress, once so finding, would violate appellee's due process and First Amendment rights if it then legislated that effective counsel was prohibited. Goldberg v. Kelly, 397 U.S. 254 (1970), United Transportation Union v. Michigan Bar, 401 U.S. 576 (1971) and United Mineworkers v. Illinois Bar, 389 U.S. 217 (1967). In fact, the government's argument leads to the unconstitutional conclusion that counsel is permitted only so long as it is ineffective or incompetent.

B. The Record Documents The Inadequacy of Service Representatives and the Quasi-Adversarial Nature of V.A. Proceedings.

The government's euphoric and sanitized description of the V.A.'s alleged "non-adversarial" system is in conflict with the record below and is an elaborate

legal camouflage of a reality that no court, particularly this court, can or should ignore. Although 87 percent of claimants are represented by service representatives (J.A., 574), less than one percent (.9%) of all V.A. initial decisions are appealed (J.A., 387) and regarding the final appeal before the BVA, only four percent of the cases decided involve personal appearances. (R 73, Ex 70 at 81, J.A., 602-05).

No experience within the adversarial or bureaucratic system would argue on behalf of such a record. It is, for example, preposterous to assume the human infallibility implicit in a less than one percent appeal rate. It is similarly preposterous to assume that decision-makers are immune to personal argument as is implicit in the mere four percent appearance rate at BVA hearings. (J.A., 334)

Most damning to the government's argument regarding the adequacy of service representatives and the non-adversarial procedures of the V.A. in protecting the due process and First Amendment rights of SCDD claimants is the bottom line regarding complex cases. None of the more than six thousand Agent Orange cases (J.A., 519) and only one percent (15 of 2,000) of atomic radiation cases (J.A., 518) have been adjudicated in favor of the claimant.

The effectiveness of the V.A. itself is similarly questionable. For example, it rarely (one out of every ten thousand claims adjudicated) seeks advisory medical opinions and has almost never invoked its statutory power, 38 U.S.C. §3311, to subpoena documents (only five subpoenas issued since 1976 and most against the veteran), despite employing more than 800 attorneys within the adjudicative process

at issue. (R 86, Der. Aff. ¶2, J.S., App. A at 35a; V.A. Int. Ans. 21-22; J.A., 331-33)

The amicus curiae brief of the Disabled American Veterans in support of the United States fails to raise, much less explain why, if its service representatives are an adequate substitute for legal counsel: less than one percent of all cases are appealed, only one in ten thousand claims involve supporting medical documentation, records no matter how pertinent are never subpoenaed, and ninety-six percent of final appellate decisions occur without an oral hearing.

C. In a Free Market, Uncompensated Service Representatives Would Prevail Over Compensated Attorneys, Assuming the Former Were Effective.

The fear of the Disabled American Veterans that the availability of paid counsel will destroy it and service representatives is unfounded.

If service representatives are extraordinarily beneficial to veterans, as alleged by the DAV, the threat of compensated attorneys will have no adverse impact on its dominance. In a free market, given no other variables, veterans will obviously seek skilled uncompensated service representatives and shun well-paid lawyers of dubious skill and integrity. This is particularly so given the clear competitive advantages that service representatives have by dint of their long history and extensive network of veteran contacts and references. In fact, unless paid counsel are substantially and clearly more effective than service representatives, it is unlikely that veterans, particularly in the long-run, will choose to bring attorneys into the V.A. process. Ultimately, should appellees prevail, service organizations setting forth the relative

competitive merits to veterans of uncompensated versus compensated representatives would seem to offer the most protection to veterans.

The paternalism that underpins the government's interference in veterans' First Amendment rights is puzzling. It is contrary to the free market principles and consumer free choice philosophy upheld by this court, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) and inconsistent with the spirit of the antitrust briefs filed by the Attorney General and Solicitor General in the federal courts during the last four years. Ironically, the government offers no justification for distinguishing between the need for paternalism here, where it is unwanted and the antitrust cases before this Court where the government urges a free

market even if the affected parties oppose such.

D. Even Non-Adversarial Proceedings Require Counsel to Ensure Due Process.

In an increasingly complex society, governed by increasingly obscure and changing statutes, regulations and informal codifications of procedures, it is a rare individual, even in a so-called non-adversarial system, who is better off without a skilled lawyer. This is particularly so when the class of persons, as herein, consists of a large number of non-high school graduates and few college graduates and, by definition, many who are physically and mentally disabled. (J.A., 146)

The compelling need for skilled counsel, even in a non-adversarial system, which the V.A. system surely is not, is illustrated by the recent experience of the present Attorney General. Faced

with a non-adversarial Special Counsel investigation of a relatively simple factual situation almost exclusively within his own knowledge, the Attorney General, apparently quite properly, sought expensive and nationally-renown counsel to represent his interests. The cost, which is likely to be borne by the taxpayers, was 72,000 times greater than the present maximum permitted to veterans who pursue V.A. claims.

In a judicial era where criminals are granted the right to counsel, Bounds v. Smith, 430 U.S. 817 (1977) and Younger v. Gilmore, 404 U.S. 15 (1971), and the poorest welfare recipient is permitted even in the simplest of cases to retain counsel in suits against the government, it is exceedingly difficult, if not impossible, to appreciate the rationale or justification for abridging the First and Fifth Amendment rights of those who

have sought to make those rights possible for all Americans. In fact, no class of Americans, except veterans, are systematically precluded from seeking legal counsel where important economic or personal rights are at stake.

Thus, as a result of veterans being barred from any judicial remedy under the Federal Torts Claim Act, Feres v. United States, 340 U.S. 135 (1950), and the absence of judicial review over V.A. decisions, 38 U.S.C. §211(a), the government has, in effect, imposed on veterans, and no other class of Americans, a uniquely oppressive unilateral "contract" that is far more onerous than the typical contract of adhesion used by insurance companies.

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CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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AMERICAN G.I. FORUM

March 1985